Supreme Court of the United States

October Term, 1972

No. 72-777

CLEVELAND BOARD OF EDUCATION, *et al.*,
Petitioners,

vs.

JO CAROL LaFLEUR, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
and
BRIEF AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The International Association of Official Human Rights Agencies respectfully moves, pursuant to Rule 42, for leave to file the attached brief *amicus curiae* on behalf of Respondents in this case. Consent of Respondents has been granted; consent of Petitioners has been denied.

The International Association of Official Human Rights Agencies (IAOHRA) is an association of state and local civil rights agencies engaged in identifying and eliminating discrimination on the basis of race, sex, religion, and national origin in the areas of employment, housing, education, and public accommodations. The 87 member agencies and 500 constituent agencies of IAOHRA are

charged with protecting and advancing the cause of human rights by administering and enforcing state and local anti-discrimination laws. The issues raised in this proceeding are similar to issues raised before state and local civil rights agencies, and the decision rendered by this Court will have substantial effect on pending and *in futuro* cases before these agencies. Reversal of the decision below could result in practices which perpetuate sex discrimination, thereby affecting the enforcement responsibilities of state and local civil rights agencies. Therefore, we respectfully request that this motion for leave to file an *amicus* brief be granted. Filed herewith is our brief as *amicus curiae*.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, reversing the judgment of the United States District Court for the Northern District of Ohio, is reported in 465 F.2d 1184 (1972). The opinion of the District Court is reported in 326 F. Supp. 1208 (N.D. Ohio, 1971).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered on July 27, 1972. The Cleveland Board of Education's Motion for a Rehearing *en banc* was denied on August 29, 1972. The Petition for a Writ of Certiorari was filed on November 27, 1972 and granted on April 23, 1973. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, § 1 ". . ., nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

Civil Rights Act of 1871, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

QUESTION FOR REVIEW

Whether the Cleveland Board of Education's mandatory maternity leave regulation, which requires all pregnant teachers, regardless of ability to continue working, to take an unpaid leave of absence no later than the end of the fourth (4th) month of pregnancy and precludes re-employment until the beginning of a new school semester after the baby is at least three (3) months old, constitutes sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The District Court answered this question, "No." The Court of Appeals reversed and answered, "Yes." *Amicus*

contends the decision of the Court of Appeals should be affirmed.

STATEMENT OF THE CASE

Respondents' statement of the case is hereby adopted.

SUMMARY OF ARGUMENT

The mandatory maternity leave regulation of the Cleveland Board of Education, which forces all pregnant teachers to take an unpaid leave of absence no later than the end of the fourth (4th) month of pregnancy and forbids re-employment with the Board until the commencement of a new school semester after the child is at least three (3) months old, is discrimination based upon sex and violates the Equal Protection Clause of the Fourteenth Amendment.

The regulation, which treats pregnancy differently and more harshly than any other physical condition, should not withstand the reasonableness test of constitutionality because it is arbitrary and lacks any rational relation to a legitimate purpose.

Furthermore, in light of this Court's recent decisions in *Reed v. Reed*, 404 U.S. 71 (1971) and *Frontiero v. Richardson*, 93 S. Ct. 1764 (1973), the regulation, which is based on a suspect classification and interferes with fundamental rights, should be judged under the strict scrutiny test of equal protection and measured by a standard of compelling state interest rather than mere rational basis.

Overwhelming authority supports Respondents' position that, under any standard of review, the regulation violates the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

I. THE MANDATORY MATERNITY LEAVE REGULATION OF THE CLEVELAND BOARD OF EDUCATION DISCRIMINATES AGAINST WOMEN EMPLOYEES OF THE BOARD IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Introduction

Section 1 of the Fourteenth Amendment provides, *inter alia*, that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws". This basic constitutional commandment "does not prevent the states from resorting to classification for the purposes of legislation," but does require that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). In addition, the purpose of the legislation must itself be a constitutionally permissible one. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969).

In the past, this Court has utilized two distinct standards of review for determining whether a statute or regulation violates the equal protection clause. In cases involving routine regulatory legislation, the test of reasonable classification has been applied: Does the classification bear a reasonable and just relation to a permissible objective? Under this standard, if the purpose of the statute or regulation is a permissible one and if the statutory classification bears the required fair relationship

to that purpose, the constitutional mandate will be held satisfied. *McGowan v. Maryland*, 366 U.S. 420 (1960); *Dandridge v. Williams*, 397 U.S. 471 (1970).

In two types of cases, however, this Court has applied a more stringent test. When the statute or rule affects "fundamental rights or interests," or when the statute or rule classifies on a basis "inherently suspect," the Court will subject the rule to "the most rigid scrutiny" and has held that the classification, to be valid, must "promote a *compelling* governmental interest," *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (emphasis in original), or serve some "overriding" purpose, *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). See also, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("strict scrutiny" required of sterilization law); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 760 (1966) (classifications which "invade or restrain . . . fundamental rights and liberties" must be "closely scrutinized and carefully confined"); *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (statutes imposing racial classifications bear a "heavy burden of justification"); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968) (court is "extremely sensitive" to classifications which affect "basic civil rights"); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("heightened judicial solicitude" is required for certain classes of persons); *Frontiero v. Richardson*, 93 S. Ct. 1764 (1973) (plurality opinion); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 (1969).

Recent decisions of this Court support the proposition that even as to the more lenient test of "reasonable classification," the standard of inquiry and review is not so deferential to legislative judgment as had been previously supposed. *Reed v. Reed*, 404 U.S. 71 (1971);

Stanley v. Illinois, 405 U.S. 645 (1972). The Court appears to be moving toward a third test—a reconciliation of the traditional two-tier test—by posing certain fundamental inquiries in all equal protection cases. This new intermediate standard requires that the legislation be "closely scrutinized," and that the proponent of a challenged classification show that it is "necessary to the accomplishment of legitimate [governmental] objectives." *Bullock v. Carter*, 405 U.S. 134, 144 (1972). See also, *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 173 (1972); *Police Department v. Mosley*, 408 U.S. 92, 95 (1972); *Reed v. Reed*, *supra*; *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972); *Vlandis v. Kline*, 93 S. Ct. 2330, 2339 (1973) (White, J., concurring); Gunther, *In Search of Evolving Doctrine on a Charging Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1, 17 (1972).

The mandatory maternity leave regulation of the Cleveland Board of Education, which requires female teachers to resign their position no later than the end of the fourth (4th) month of pregnancy and forbids them to return to teaching until the beginning of a regular school semester after the child is at least three (3) months old (A. 54-55), must be held unconstitutional when judged by *any* of the applicable standards—"strict scrutiny," reasonableness, or the evolving doctrine of "more closely scrutinized." However, of these tests, and in light of the recent decision by this Court (*Frontiero v. Richardson*, *supra*) it appears that the proper standard of review to test the constitutionality of the Cleveland Board of Education's maternity policy should be "strict scrutiny" because the regulation in question classifies on the basis of sex, and this Court has recently held that ". . . [c]lassifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." *Frontiero v. Richardson*, *supra* at 1768 (1973).

A. The Regulation Is Unconstitutional Under the Traditional Reasonableness Standard.

The maternity regulation of the Cleveland Board of Education must be held unconstitutional even if only judged by the traditional test of reasonableness. The rule is not reasonable but arbitrary and has no "fair and substantial relation to the object of the legislation," *F.S. Royster Guano Co. v. Virginia, supra.* Maternity leave rules, based on unwarranted assumptions and stereotyped characterizations about women are an outdated vestige of a by-gone era when "laws which disabled women from full participation in the political, business and economic arenas . . . [were] . . . characterized as 'protective' and beneficial." *Sail'er Inn v. Kirby,* 485 P.2d 529, 541 (1971). Such laws can no longer be explained on any rational basis. *Karezewski v. Baltimore and Ohio R.R. Co.,* 274 F. Supp. 169 (N.D. Ill. 1967); *Mengelkoch v. Industrial Welfare Commission,* 442 F.2d 1119 (9th Cir. 1971).

Historically, state statutory classifications have been accorded great deference, perhaps because most dealt with economic regulation under a state's police power. *McGowan v. Maryland, supra* at 425; *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911); *Atchison T. & S.F.R. Co. v. Matthews,* 174 U.S. 96 (1899); *Williamson v. Lee Optical,* 348 U.S. 483 (1955). But the exercise of judicial restraint has never blinded this Court to real inequalities enacted under the guise of reasonableness. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886).

Petitioners assert that decisions by the Court, prior to *Reed* and *Frontiero,* permit the application of the traditional standard of review in cases of sex discrimination. *Muller v. Oregon,* 208 U.S. 412 (1908); *Goesaert v. Cleary,*

335 U.S. 464 (1948); *Hoyt v. Florida*, 368 U.S. 57 (1961) (Petitioners' Brief, pp. 31-33). In so doing, Petitioners not only ignore the significance of *Reed* and *Frontiero*, but also rest on precedent expressing a view of women that this Court has called "offensive to the ethos of our society." *U. S. v. Dege*, 364 U.S. 51, 53 (1960). *Muller* should be seen in its proper context: turn of the century working conditions when women labored long hours in sweatshop operations. Decided just three years after *Lochner v. New York*, 198 U.S. 45 (1905), *Muller* was brought by an employer challenging the state's police power to legislate in the area of hours of labor and not by a woman employee seeking equal treatment under law. This distinction has been forcefully made by the Court of Appeals for the Ninth Circuit in *Mengelkoch v. Industrial Welfare Commission*, 442 F.2d 1119, 1123 (1971).

Similarly *Goesaert* has lost what vitality it once had. See *Patterson Tavern & Grill Owner's Association v. Hawthorne*, 57 N.J. 180, 270 A.2d 638 (1970); *Seidenberg v. McSorley's Old Ale House*, 317 F. Supp. 593 (S.D. N.Y. 1970); and, most significantly, *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971), followed in *Frontiero v. Richardson, supra*. The starting premise in *Goesaert*—that a state could deny all women opportunity for employment—is questionable given the Court's recognition of the importance of employment. See *Truax v. Raich*, 239 U.S. 31, 41 (1915) (right to work without discrimination on grounds of race or nationality "is of the very essence of the personal freedom and opportunity that is the purpose of the [14th Amendment] to secure").

The Court has never explicitly overruled these old cases because the evolution of equal protection doctrine impliedly has done so. See *Reed v. Reed, supra; Frontiero v. Richardson, supra*. *Reed* and *Frontiero* should be seen as

repudiations of the *Muller* and *Goesaert* line of cases. Petitioners rely on *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1278 (1973) to establish the traditional standard of review in the instant case so that they can rely on the foregoing "old" cases. Such an attempt bespeaks Petitioners' refusal to acknowledge the importance of *Frontiero*. Petitioners view *Frontiero* as only a "military" case and the case at bar as only an "educational policy" case, rather than seeing these cases for what they are—instances of sex discrimination.

The maternity rule must certainly fail when judged by the intermediate standard requiring that legislation be "closely scrutinized," and that the proponent of the challenged rule show that it is "necessary to the accomplishment of legitimate [governmental] objectives." *Bullock v. Carter, supra.*

In recent decisions, this Court has avoided using terminology which establishes a rigid dichotomy between strict and minimal scrutiny. The Court has "narrowed the linguistic gap between the two standards", *Green v. Waterford Board of Education*, 473 F.2d 629, 633 (2nd Cir. 1973), by posing certain fundamental inquiries applicable to "all" equal protection claims. In *Weber v. Aetna Casualty and Surety Co., supra* at 173 (invalidating a Louisiana workman's compensation law that discriminated against dependent unacknowledged illegitimate children), the Court declared that the "essential inquiry" in all equal protection cases is "[i]nevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" This inquiry was repeated in *Police Department of Chicago v. Mosley, supra* at 95 (ordinance that differentiated between types of peaceful picketing on the basis of subject matter held unconstitutional):

"As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." Similarly, in *Dunn v. Blumstein*, *supra* at 335 (invalidating a one year durational residency requirement for voting), Mr. Justice Marshall elaborated the crucial question to be asked in equal protection analysis by developing a three-factor analysis applicable to all varieties of equal protection cases which emphasized that equal protection tests do not have the precision of mathematical formulas but rather represent a "matter of degree." Significantly, his formulation of this analysis in the majority opinion in *Dunn* reiterates the test he advocated in his dissent in *Dandridge v. Williams*, 397 U.S. 471 (1970).

The standard of review established by the foregoing cases indicates that this Court will no longer speculate as to what legitimate state objectives may have been furthered by a challenged classificatory scheme. Rather, it will assess the legislative means in terms of whether the purposes have substantial basis in fact, not merely conjecture. Even more significantly, "the Court's definition of what constitutes the necessary rational relationship between a classification and a legitimate governmental interest seems to have become slightly, but perceptibly, more rigorous." *Green v. Waterford*, *supra* at 633. See also, *Weber v. Aetna Casualty & Surety Co.*, *supra*, at 175: "the inferior classification of dependent unacknowledged illegitimate bears . . . no *significant relationship* to those recognized purposes . . . which workmen's compensation statutes commendably serve." (Emphasis added)

The standard of more "closely scrutinized" review, sometimes referred to as the "means-focused" rational basis test (Gunther, *supra*), has been explicitly extended to statutes which discriminate on the basis of sex, and

such classifications have been held invalid by this Court. In *Reed v. Reed, supra* the Court held unconstitutional an Idaho sex-based classification which gave mandatory preference to men over women in the administration of decedent's estates. Mr. Chief Justice Burger noted that Idaho's stated purpose of reducing the probate court's workload by eliminating the need for a hearing in one class of contests "is not without some legitimacy." However, the Court found "crucial" the question of whether the statute advanced the stated objective "in a manner consistent with the command of the Equal Protection Clause." In holding that it did not, the Court said:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . *Reed, supra* at 76.

Petitioners have offered two reasons in support of their argument that the maternity regulation is reasonable and properly related to a legitimate purpose: 1) ensuring that only "able-bodied" teachers are presiding over classrooms, and 2) preventing administrative problems which might occur in replacing teaching personnel who take leave of absences (Petitioners' Brief, p. 19).

The facts and logic relied on by the school board to justify the regulation have no basis in fact and are not supported by reasoned analysis. Even assuming that Petitioners' administrative convenience rationale were warranted, it is evident after *Reed* that such a justification is not sufficient for permitting the sex-role stereotyping which exists in a mandatory maternity leave policy. In point of fact, however, Petitioners' asserted rationales for its policy are unwarranted.

In maintaining that the regulation ensures that only "able-bodied" teachers preside over classrooms, Petitioners make unsupportable assumptions. It is the *mandatory* feature of the maternity leave regulation which is being challenged by Respondent. No one questions that a pregnant teacher who is advised by her physician to take a leave of absence for health reasons should have a right to do so. The crucial question is, however, whether a pregnant teacher may be forced to take a leave of absence after the fourth month of pregnancy even if her own doctor would permit her to continue working, and she desires to do so (A. 48-50, 72-73). Further, the issue is whether this teacher should be forced to remain away from her job from eight months to over a year after the birth of her child, thereby losing wages, pension, insurance, and seniority rights.

As this Court has recognized, resort to group stereotype as a basis for legislative line-drawing is wholly at odds with the principle of equality of individuals before the law. In striking down an Illinois statute which mandated the presumption that an unwed father was not entitled to the same custody rights of his natural children as their natural mother, this Court stated that:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. *Stanley v. Illinois,* 405 U.S. 645 (1972).

The maternity regulation challenged in this case resorts to group stereotyping by treating pregnancy on a

generic basis and imposing the same requirements on all pregnant teachers regardless of their individual differences or abilities. Expert medical opinion has established that no two pregnancies are identical. Curran, *Equal Protection of the Law: Pregnant School Teachers*, 285 NEW ENGLAND J. MD. 336 (1971); Testimony of Andre E. Hellegers, M.D., *In the Matter of Petitions filed by EEOC, et al.*, Docket No. 19143, Federal Communications Commission (1971). Expert medical witnesses of both parties in the instant case agreed that pregnancy required individualized treatment and no medical rule required all pregnant women to leave work several months prior to childbirth (A. 91-93, 121, 124, 128, 148-149, 156). The rule in question imposes disabilities upon an individual female teacher which may far exceed any disabilities inherent in her pregnancy. In considering a similar maternity regulation, a United States District Court had this to say:

> It is the very inflexibility of the Board's policy which casts a light of dubious constitutionality about its regulations. Pregnancies, like law suits, are *sui generis*. While there are certain general similarities between each pregnancy, no two are entirely identical. While it may be quite true that some women are incapacitated by pregnancy and would be well advised to adopt regimens less strenuous than those borne by school teachers, to say that this is true of all women is to define that half of our population in stereotypical terms and to deal with them artificially. Sexual stereotypes are no less invidious than racial or religious ones. *Phillips v. Martin-Marietta Corporation*, 400 U.S. 542, 91 S. Ct. 496, 27 L. Ed. 2d 613 (1971); *Sprogis v. United Air Lines, Inc.*, 444 F. 2d 1194 (7th Cir., 1971). Any rule by an employer that seeks to deal with all pregnant employees in an identical fashion is dehu-

manizing to the individual women involved and is by its very nature arbitrary and discriminatory. *Heath v. Westerville Board of Education*, 345 F. Supp. 501, 505 (1972).

Nor are there any distinct characteristics of pregnancy that warrant treating it as a special condition not entitled to the benefits given other temporary medical conditions; yet, the Board of Education has no mandatory leave policy for any other temporary medical condition (A. 206-207). Rather, other conditions are treated under the rubric "sick leave" on an individual basis which considers the teacher's ability to function in the classroom[1] (A. 179-180, 206). Certainly a mere increase in weight and change in physical shape are not, by definition, disabilities which should raise the presumption that a pregnant school teacher is not able-bodied. See *Parolisi v. Board of Examiners of City of New York*, 55 Misc. 2d 546, 285 N.Y.S.2d 936 (Sup. Ct. 1967), holding that the dismissal of a teacher for obesity was arbitrary since the condition did not impair her ability to teach.

The maternity policy also bears no rational relationship to Petitioners' asserted justification of minimizing administrative problems that might occur in replacing pregnant teachers in the classroom (Petitioners' Brief, pp.

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1. The Cleveland Board of Education is empowered by statute (Ohio Revised Code, Section 3319.13) to demand that an ill or disabled teacher take a leave of absence. Teachers whose livelihood is threatened by unrequested and undesired leave may present evidence of ability to work at hearing conducted in accordance with basic procedural due process safeguards (Ohio Revised Code, Section 3319.16). But when a teacher becomes pregnant, no showing of incompetency is necessary to terminate her employment. Indeed, her competency to teach is never questioned. Rather, Petitioners arbitrarily classify all women who have reached their fifth month of pregnancy as being incapable of teaching, force the teacher to take an extended unpaid leave, and label the policy "maternity leave."

11-12; A. 198-199). While continuity of instruction may be an important value, a pregnant teacher who provides the Board with a date for beginning her leave preserves that value. A teacher who takes a leave of absence due to a sudden illness disrupts the continuity of teaching even more than a woman who takes a planned leave of absence because of pregnancy. Moreover, where a teacher has a serious, even terminal, illness or an operable illness that will necessitate the teacher missing time from work, the problems of finding a suitable replacement and arranging for the continuity of classroom programs are the same for the School Board as when a teacher is pregnant. Yet, in such cases, unlike pregnancy, there are no regulations requiring the teacher to leave five months before the operation (A. 206-207). The teacher may remain until he can no longer function effectively in the classroom. Any benefits of the challenged rule flow from the fact that the school has advance notice of the teacher's departure—not from the fact that the rule requires such departure after a certain month of pregnancy (A. 206). The School Board is more likely to have notice, and time to deal with administrative problems when the teacher is pregnant than when absence is caused by an accident or illness. The fact that childbirth is a determinable event gives that element of "predictability" that Petitioners might argue is so necessary to their job of replacement. Indeed, the disruption of the educational process would be reduced, not increased, if those teachers willing to work beyond four months were permitted to do so. Strict application of the maternity rule will often *cause* the very interruption Petitioners contend it was designed to prevent. In the case at bar, for example, Petitioners' policy forced Respondent to leave in the middle of the school year rather than complete the semester with her class (A. 53).

In a case challenging a similar maternity regulation, the United States District Court for the Northern District of California considered both the problem of replacing teachers and the problem of classroom disruption. The court stated:

> The District's present administrative apparatus seems entirely adequate to cope with such situations, particularly since the use of substitutes is a common and widespread practice. Most onsets of illness, unlike pregnancy, result in employee absences with far less advance notice than is the case with pregnancy, and such other illnesses may result in absences for longer periods than are required for normal pregnancies. It is for just such contingencies that the District has made provision for a pool of qualified substitutes available as temporary replacements on short notice. *Williams v. San Francisco Unified School District,* 340 F. Supp. 438, 445 (N.D. Cal.'1972)

Following its decision in *Reed v. Reed, supra,* this Court should declare the mandatory maternity leave policy of the Cleveland Board of Education unconstitutional in light of the Fourteenth Amendment's mandate of Equal Protection. The United States Court of Appeals for the Sixth Circuit, following *Reed,* reached this conclusion in the opinion below. *LaFleur v. Cleveland Board of Education,* 465 F.2d 1184 (6th Cir. 1972). Similar results occurred in the Court of Appeals for the Second Circuit (*Green v. Waterford Board of Education, supra*) and the Tenth Circuit (*Buckley v. Coyle Public School System,* 476 F.2d 92 (10th Cir. 1973)) *Contra, Cohen v. Chesterfield County School District,* 474 F.2d 395 (4th Cir. 1973).

Federal District Courts faced with this issue have also concurred: *Bravo v. Board of Education of the City of Chicago,* 345 F. Supp. 155 (N.D. Ill. 1972); *Heath v. Wester-*

ville Board of Education, 345 F. Supp. 501, 505 (S.D. Ohio 1972); *Williams v. San Francisco Unified School District*, 340 F. Supp. 438, 443 (N.D. Cal. 1972); *Pocklington v. Duval County School Board*, 345 F. Supp. 163 (M.D. Fla. 1972).

Petitioners' rule has no rational basis in fact; it may actually thwart the goal Petitioners assert they seek. The mandatory leave policy for pregnant teachers must be viewed for what it truly is, an anachronism premised on sex discrimination, and nothing more (A. 173, 176).

B. The Regulation Is Unconstitutional Under the Traditional Rational Basis Standard as Applied in Rodriguez.

Petitioners assert that this Court's recent decision in *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1278 (1973), requires that the traditional standard of review in equal protection cases be applied in determining the constitutionality of their maternity regulation because their regulation is "educational policy." *Rodriguez* can readily be be distinguished from the case at bar; but even if Petitioners' argument that the maternity rule in the instant case should be judged by the traditional standard of review is accepted, the maternity regulation would still be unconstitutional as it is arbitrary and bears no rational relationship to a legitimate goal.

The issue in the instant case involves a classification based on sex in the area of employment; *Rodriguez*, on the other hand, involves the complex issues of taxation, federalism, and educational policy. The cases are similar only in that they both concern school systems.

According to Petitioners, *Rodriguez* reverts to a minimal scrutiny, "hands off," standard of review, thereby

raising anew the problems inherent in the rigid two-tiered equal protection analysis. Not only does this argument construe *Rodriguez* simplistically; it ignores recent decisions developing the rational "means-focused" test. *Reed v. Reed, supra*; *Bullock v. Carter, supra*; *Weber v. Aetna Casualty and Surety Co., supra*; *Dunn v. Blumstein, supra*; *Police Department of Chicago v. Mosley, supra.*

This Court has not hesitated to decide equal protection issues raised in the field of education (*e.g., Brown v. Board of Education*, 347 U.S. 483 (1954)), but the Court indicated it viewed *Rodriguez* as something different than one more in a long line of education cases. It found that in significant aspects the case was "*sui generis*" and hence could not be "so neatly fitted into the conventional mosaic of constitutional analysis under the Equal Protection Clause." *Rodriguez, supra* at 1288. As Mr. Justice Powell, writing for the majority, framed the issue:

> This case represents far more than a challenge to the manner in which Texas provides for the education of its children. We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures. *Rodriguez, supra*, at 1300.

It has deferred in the past, said the Court, and should continue to do so, because "the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues." *Rodriguez, supra* at 1301.

In addition to traditional deference for state fiscal policies and the resulting implications for the concept of federalism (*Rodriguez*, *supra* at 1302), *Rodriguez* also involved a unique issue of educational policy: the unsettled and controversial question of whether there is any correlation between educational expenditure and educational quality. The correlation—or lack of it—is a matter of considerable dispute among educators and also the basis underlying virtually every legal issue in *Rodriguez*; therefore, the Court was especially unwilling to impose on the state of Texas any constitutional restraints in this area (*Rodriguez*, *supra* at 1301-02).

The difficult questions of local taxation, fiscal planning, federalism, and education policy appropriately counseled a more restrained standard of review in *Rodriguez*; and although the instant case does present to this court a legislative classification, it does not do so "in a *Rodriguez* situation." (Petitioners' Brief, p. 3).

II. THE MANDATORY MATERNITY LEAVE REGULATION OF THE CLEVELAND BOARD OF EDUCATION SHOULD BE JUDGED BY THE STRICT SCRUTINY STANDARD OF EQUAL PROTECTION.

A. The Regulation Is a Sex-Based Classification.

Sex is a suspect classification which should trigger the Court's special scrutiny. The initial obstacle to this argument is the assertion by petitioners that the regulation in question is not a classification based on sex but rather a classification based on pregnancy (Petitioners' Brief, pp. 23-25). Without question, pregnancy is a sex-

linked characteristic and it is clear that a rule based on pregnancy is a sex-based rule. Chief Judge Brown of the United States Court of Appeals for the Fifth Circuit has best treated this issue:

> The distinguishing factor seems to be motherhood. . . . The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic and life-tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a Woman. *Phillips v. Martin-Marietta*, 416 F.2d 1257, 1259 (5th Cir. 1969) (C.J. Brown dissenting).

The *Phillips* case arose under Title VII of the 1964 Civil Rights Act (42 U.S.C. §§2000(e) *et seq.*). This Court agreed with Chief Justice Brown and held that a rule designating one hiring policy for women and a different one for men, when both had pre-school age children, violated Title VII. *Phillips v. Martin-Marietta Corporation*, 400 U.S. 542 (1971).

Neither can Petitioners logically argue that the maternity rule is not a sex-based classification because the rule does not affect all women at any one time. Again, it is clear that the rule affects women, and only women, since the policy is based on a patently feminine condition, biologically possible only in the female sex. Sex is thus a definitional element in employment disqualification.

Nor does the fact that the policy cannot apply to men prevent it from being discriminatory. As the Court of Appeals for the Seventh Circuit noted: "Discrimination is not to be tolerated under the guise of physical properties possessed by one sex." *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971).

A regulation designed to restrict the employment rights of pregnant teachers can only be viewed as a regulation which restricts the employment rights of women as a sex. As stated by Judge Wisdom, dissenting in *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), "Female employees are the only employees . . . who become pregnant; it follows that they are provisionally dismissed from work on account of their sex. . ." 459 F.2d at 42.

The Court below, in the instant case, noted: "Here, too, we deal with a rule which is inherently based upon a classification by sex. Male teachers are not subject to pregnancy, but they are subject to many types of illnesses and disabilities." *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972). Similarly the Court of Appeals for the Tenth Circuit concluded that a mandatory maternity leave "penalizes the feminine school teacher for being a woman . . ." *Buckley v. Coyle Public School System*, 476 F.2d 92 (10th Cir. 1973). See also *Green v. Waterford Board of Education*, 473 F.2d 629 (2nd Cir. 1973).

Legal scholars have also recognized that a maternity leave policy discriminates on the basis of sex because the policy is based on a condition peculiar to one sex:

> Where a woman who is capable of performing her job is discharged or compelled to take a leave of absence because she is pregnant, sex discrimination has occurred; she has been eliminated on the basis of a physical condition peculiar to her sex. The situation is no different than where a capable man is eliminated because of a condition peculiar to men, such as spermatorrhea or red-green color blindness. Comment, *Sex Discrimination in Employment: An At-*

tempt to Interpret Title VII of the Civil Rights Act of 1964, 1968 DUKE L.J. 671, 722.

See also, Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U.L. REV. 723, 727-28 (1935); Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. L. REV. 281, 296-97 (1971); Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 738-41 (1971); Note, *Are Sex-Based Classifications Constitutionally Suspect?*, 66 Nw. U.L. REV. 481 (1971); Note, 84 HARV. L. REV. 1499 (1971); Note, *Fair Employment—Is Pregnancy Alone a Sufficient Reason For Dismissal of a Public Employee?*, 52 B.U.L. REV. 196 (1972).

Thus, a rule based on pregnancy is in fact a sex-based classification. The question, then, is whether sex is a "suspect" classification which will trigger the Court's special scrutiny.

This Court has long recognized that classifications based on race, national origin, and alienage are "suspect" and thus subject to the "strict scrutiny" test of Equal Protection:

> all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . and courts must subject them to the most rigid scrutiny. *Korematsu v. United States*, 320 U.S. 214, 216 (1944).

See also, *Bolling v. Sharpe*, 347 U.S. 497 (1954); *McLaughlin v. Florida*, 379 U.S. 134 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967).

Legal precedent has been established for regarding sex as a suspect category and subjecting classifications based on sex to the "compelling governmental interest" test of constitutionality. The classic examples of suspect

classifications which have invoked the strict scrutiny of courts are race, alienage and national origin. The common trait of race, alienage, national origin and *sex*-based classifications is immutability—members of the group are locked into their status by an accident of birth. Thus, the criteria for defining a suspect classification must certainly turn on the inability of an individual to change his or her status; for it is unjust to classify an individual on the basis of a congenital and unalterable trait over which he or she has no control, thereby, giving credence to the stigma of inferiority which usually attaches to such classifications. *Frontiero v. Richardson, supra*; *Sail'er Inn v. Kirby, supra.*

Recently, holding unconstitutional a military dependency statute which classified on the basis of sex, this Court held sex to be a suspect basis of classification and noted that "this departure from 'traditional' rational basis analysis with respect to sex-based classifications is clearly justified" *Frontiero v. Richardson,* 93 S. Ct. 1764 (1973). Citing support for such an approach in the unanimous decision of *Reed v. Reed,* 404 U.S. 71 (1971), the plurality opinion in *Frontiero,* delivered by Justice Brennan, declares with unmistakable clarity that legislative classifications premised on unalterable sex characteristics which accord males and females different treatment solely on the basis of sex are inherently suspect and must be subjected to strict judicial scrutiny:

> . . . since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the member of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . . And what differ-

entiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria is that the sex characteristic frequently bears no relation to ability to perform or to contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. *Frontiero, supra,* at 1770.

Petitioners' mandatory maternity leave regulation classifies on the basis of sex and must be judicially reviewed under the test of strict scrutiny; Petitioners can only justify this regulation as one necessitated by a compelling governmental interest. We submit that Petitioners are unable to justify their regulation under the more lenient test of reasonableness and certainly cannot justify the rule on the basis of a compelling governmental interest.

B. The Regulation Abridges Respondents' Fundamental Constitutional and Civil Rights.

Not only is sex a suspect classification, but the challenged maternity regulation also abridges a number of Respondents' fundamental rights and liberties. Classifications which invade or restrain such rights must be closely scrutinized and carefully confined. *Harper v. Virginia State Board of Elections, supra.* A regulation which denies constitutionally protected freedom and is based upon a suspect classification must bear a heavy burden of justification and should be upheld only if it is both necessary to and based on a compelling governmental interest, not merely rationally related to the accomplishment of a per-

missible state policy. *McLaughlin v. Florida, supra.* Petitioners have contravened both Respondents' right to work at their chosen profession and their right to bear children; thus, the appropriate standard of review in this case must be strict judicial scrutiny.

Although the Supreme Court has never specifically defined what constitutes a "fundamental right," the right to work at one's chosen profession as well as the right to bear children, must surely both be included within that concept. The opportunity to earn a living is a right fundamental to the enjoyment of all other rights of life and liberty. As Professor Charles Reich stated in *The New Property* (73 YALE L.J. 733, 738 (1964)):

> . . . today more and more of our wealth takes the form of rights or status rather than tangible goods. An individual's profession or occupation is a prime example. To many others, a job with a particular employer is the principle form of wealth. A profession or a job is frequently far more valuable than a house or bank account, for a new house can be bought, and a new bank account created, once a profession or job is secure.

Since 1884, in *Butcher's Union v. Crescent City,* 111 U.S. 746 (1884), this Court has declared that the right to follow any of the common occupations of life "is an inalienable right . . . formulated in the Declaration of Independence . . . a large ingredient of the civil liberty of the citizen." This holding was affirmed in *Truax v. Raich,* 239 U.S. 33, 41 (1915) when the Court stated:

> It requires no argument to show that the right to work for a living in the common occupation of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure.

The right to work is of special importance and should bear strictest scrutiny when it involves teachers. The concept of the special role and responsibilities of teachers is set forth in *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, *J.* concurring):

> To regard teachers . . . in our entire educational system, from the primary grades to the university . . . as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry, which alone makes for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere they generate. . . .

Since teachers play this special role in our society, the forced removal of pregnant teachers from the classroom demonstrates to students the very type of discrimination, based on Victorian stereotypes and lack of knowledge, that education should lead students to reject.

The Court has clearly indicated that it will protect the marital relationship and its important procreative function from interference by the state. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922) ("right of the individual . . . to marry, establish a home and bring up children" is an essential part of liberty guaranteed by Fourteenth Amendment): *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (right to bear children "fundamental" and sterilization statute must be viewed with "strict scrutiny"); *Loving v. Virginia*, 388 U.S. 1, 5 (1967) (right to marry a basic civil right and miscegenation statute must be subject to "the most rigid scrutiny"); *Griswold v. Connecticut*, 381 U.S. 478, 481 (1965) (Connecticut law prohibiting the use of

contraceptives invalidated because it interfered with "a right of privacy older than the Bill of Rights, older than our political parties, older than our school system"); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972): "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (Emphasis original).

Although these cases concern outright prohibitions on constitutionally protected rights, similar strict judicial scrutiny has been applied to regulations which condition or burden the exercise of the same protected rights. *Sherbert v. Verner*, 374 U.S. 399 (1963). The *Sherbert* case concerned a denial of unemployment compensation to a member of the Seventh-Day Adventist Church who refused to take a job which required working on Saturday, the Adventist Sabbath. In response to the state's argument that there had been no deprivation of freedom of religion, the Court held that conditioning or burdening the exercise of a constitutional right was unconstitutional, just as the outright deprivation of that protected right would be.

As in *Sherbert*, the effect of the Cleveland Board of Education's mandatory maternity leave policy is to seriously burden and condition the exercise of fundamental constitutional rights. A teacher who is four months pregnant is forced by the rule to give up her profession, even though she may be perfectly capable of continuing her work. Conversely, those teachers who are unwilling or ineligible to take an extended unpaid leave of absence are effectively deterred by the rule from bearing children. In effect, the rule forces female employees of the Board of

Education to give up one constitutional right in order to exercise another: If women wish to exercise their right to work, they must relinquish their right to have children. Since no male employee of the Board of Education is ever required to choose between these two fundamental constitutional rights, the Board is clearly discriminating against its female employees by forcing this choice upon them.

It is the *combined effect* of a rule based on a suspect classification (*i.e.* sex) which affects areas involving fundamental constitutional rights (*i.e.* work, marital privacy) that clearly indicates the appropriateness and necessity of the court applying strict scrutiny in determining the validity of the challenged rule.

The full impact and importance of discrimination based on sex which affects a fundamental interest such as employment can be seen by examining the situation of pregnant women who are forced to leave employment while they are still able to work. Some are the principal providers in a family where the husband is not working; others are not married or have been abandoned. A woman dismissed from a job because of pregnancy may be found ineligible for unemployment compensation and may be forced to resort to far more strenuous work in order to provide for herself and her family.

Statistics prove that society's ill-considered efforts to protect women (based on Victorian stereotypes and not factual evidence) actually do them more harm than good. Women's median annual earnings are only about 3/5 of men's—$4,457 and $7,664 respectively (*Background Facts on Women Workers,* 1970 U. S. Department of Labor, Women's Bureau). Much of the difference is accounted for by occupational distribution in the types and levels of jobs offered to women; but a substantial part of the gap

may reflect the real job discrimination that women suffer because of their dual roles as workers and mothers. The lowest participation of women in the labor force occurs during their childbearing and childrearing years (*Women Workers Today*, 1970, U. S. Dept. of Labor, Women's Bureau). For some women this is by preference; but for many it is the result of sex-based discriminatory rules regarding maternity leave. Women, whose salaries are vital to family income, are forced out of the labor market, while they are still able and willing to work, simply because they are pregnant.

It is undeniably clear that the manner in which a working woman's pregnancy is treated, both legally and economically, profoundly affects her entire career. Surely, it is beneficial to employers and to society as a whole to enable the valuable underutilized workforce of women to fully participate in and contribute to the labor market. *cf., United States v. Hayes International Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969). It is inescapable that sex bias takes a huge economic toll and that unreasonable maternity policies, such as the one in the case now before the Court, constitute a crucial element of sex discrimination in employment.

The Cleveland Board of Education's maternity regulation, which is premised on the suspect classification of sex and infringes upon fundamental constitutional rights must bear a heavy burden of justification. To be valid, Petitioners must show that the regulation promotes a "*compelling* governmental interest" (*Shapiro v. Thompson, supra* at 634).

C. No Compelling Governmental Interest Is Served by Petitioners' Regulation.

In assessing evidence presented by the School Board in support of the mandatory maternity leave regulation, it should be noted that in an area touching on constitutional rights, regulation must extend no further than required by the situation at hand. As this Court said in *Griswold v. Connecticut, supra* at 498:

> . . . it is clear that the State interest in safeguarding marital fidelity can by served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. See *Aptheker v. Secretary of State*, 378 U.S. 500, 514; *NAACP v. Alabama*, 377 U.S. 288, 307-308; *McLaughlin v. Florida*, 379 U.S. 184, 196. Here, as elsewhere, "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438.

The Petitioners must therefore demonstrate two things: Not only that the regulation regarding maternity leave is needed, but also that the specific provisions of the present maternity rule are required.

Petitioners have offered two reasons to support the validity of their maternity regulation: 1) concern that only "able-bodied" teachers preside over classrooms; and 2) prevention of administrative problems which might occur in replacing teachers who take leaves of absence. A full discussion of these justifications and the failure of Petitioners to prove even any reasonable relationship be-

tween the rule, the justification for the rule, and the effect of the rule has been discussed in Part I of this Brief.

The regulation challenged in this case and the statutes challenged in *Frontiero* and *Reed* all purported to serve the end of administrative convenience. Yet, administrative convenience was precisely the rationale held insufficient for sex-based classifications in *Frontiero* and *Reed*:

> [A]lthough efficacious administration of governmental programs is not without some importance, 'the constitution recognizes higher values than speed and efficiency.' *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) '. . . [In] the realm of 'strict judicial scrutiny' . . . any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very' kind of arbitrary legislative choice forbidden by the [Constitution]. . . .' *Reed v. Reed*, *supra*, at 76, 77. *Frontiero*, *supra*, at 4613.

Petitioners have utterly failed to provide any tenable administrative justification for the regulation, nor have they produced data to support their speculative arguments concerning the physical incapacity of all pregnant teachers. *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 at 1187 and 1188 (6th Cir. 1972).

The school board can give no rational argument for choosing the time of four months instead of some other period (Petitioners' Brief, p. 20; A. 119, 173, 176). Indeed, similar maternity leave regulations discussed in other cases have exhibited a variety of dates at which a pregnant teacher is compelled to discontinue her work. *See*,

e.g., Bravo v. Board of Education of the City of Chicago, 345 F. Supp. 155 (N.D. Ill. 1972) (after four months); *Pocklington v. Duval County School Board,* 345 F. Supp. 163 (M.D. Fla. 1972) (after four and one-half months); *Heath v. Westerville Board of Education,* 345 F. Supp. 501 (S.D. Ohio 1972) (after five months); *Williams v. San Francisco Unified School District,* 340 F. Supp. 438 (N.D. Cal. 1972) (after seven months). Not only have various school boards treated pregnancy differently, but expert medical opinion has established that no two pregnancies are alike. See Curran, *Equal Protection of the Law: Pregnant School Teachers,* 285 NEW ENGLAND J. MD. 336 (1971); *Love's Labors Lost: New Conceptions of Maternity Leaves,* 7 HARV. CIV. RTS. CIV. LIBS. L. REV. 260 (1972); Testimony of Andre E. Hellegers, M.D., *In the Matter of Petitions filed by the E.E.O.C., et al.,* Docket No. 19143, Federal Communications Commission (1971). That the Cleveland Board of Education would treat all pregnancies alike indicates the impermissible overbreadth of their regulation. See, *Griswold, supra* at 498.

There is no basis in fact to justify the challenged rule based on a concern for "able-bodied" teachers; but even if it were arguably true, that justification cannot amount to a compelling governmental interest. There has been a growing recognition at the Federal level (embodied by Congress in enacting Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000(e) *et seq.*) that it is no longer the legitimate business of a state, or any of its political subdivisions, to protect women by legislation which in fact discriminates against them in the field of employment. *Phillips v. Martin-Marietta Corp., supra; Rosenfeld v. Southern Pacific Co.,* 444 F.2d 1219 (9th Cir. 1971); *Bowe v. Colgate-Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969); *Weeks v. Southern Bell Tel. and Tel. Co.,* 408 F.2d 228 (5th Cir. 1969).

Nor does any factual justification exist for the challenged rule premised on the administrative inconvenience that might be caused by replacing pregnant teachers. Even assuming any disruption is caused by departing pregnant teachers, under the strict scrutiny standard the disruption necessary to amount to compelling interest must rise to the level of making a school system inoperable. *Holmes v. Danner*, 191 F. Supp. 394 (M.D. Ga. 1961), *cf., Shapiro v. Thompson, supra.* Petitioners do not argue that their school system would become inoperable if the maternity regulation were to be struck down as unconstitutional; they merely argue that striking down the rule would result in some administrative burdens. The rule itself *causes* these minor problems.

Whether the purpose of the School Board's mandatory maternity leave regulation is to insure "able-bodied" teachers in the classroom or whether its purpose is to minimize any disturbance of classroom programs caused by a teacher's departure, Petitioners have failed to demonstrate any "compelling governmental interest" in support of that policy.

III. SIGNIFICANT AUTHORITY SUPPORTS RESPONDENTS' POSITION THAT MANDATORY MATERNITY LEAVE REGULATIONS ARE DISCRIMINATORY.

The overwhelming authority among courts and governmental agencies considering mandatory maternity leave policies has declared them invalid. While it is recognized that this Court is not bound by decisions of other courts and agencies, their rationale and pervasiveness are worthy of consideration.

In *Frontiero v. Richardson, supra* at 1771 the Court noted:

> [C]ongress has itself concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.

The Court in *Frontiero* was referring to Title VII of the Civil Rights Act of 1964 which provides that no employer, labor union or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, *sex* or national origin." 42 U.S.C. § 2000e-2. Public employees, such as Respondents, were specifically exempted from Title VII coverage when the Act was first passed because it was assumed that the Fourteenth Amendment afforded them the same protection as private employees would receive under Title VII (110 Cong. Rec. 13169-72, May 9, 1964). After passage of the Act, the need to provide specific protection to public employees became increasingly clear; Title VII was amended to extend coverage to public employees (P.L. 92-261, March 24, 1972). Thus Title VII emerges as the federal congressional embodiment of a policy designed to combat discrimination; the Equal Protection Clause of the Fourteenth Amendment is the constitutional embodiment of that same policy.

On April 5, 1972, the Equal Employment Opportunity Commission, the administrative agency charged with enforcement of Title VII, adopted guidelines which declared that exclusion of employees "from employment . . . because of pregnancy is a *prima facie* violation of Title VII." (29 C.F.R. § 1604.10(a)), and required employers to treat disabilities of pregnancy and childbirth like other tem-

porary medical disabilities (29 C.F.R. § 1604.10(b)). These guidelines prohibit the maternity policy utilized by the Cleveland Board of Education in the instant case.

The significance of the Commission's guidelines was pointed out by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971): "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference. . . ." Since the Act and its legislative history support the Commission's construction, it is reasonable to construe the guidelines as expressing the will of Congress.

Similar congressional prohibition against sex-based discrimination is contained in the Equal Pay Act of 1963. 29 U.S.C. § 206(d) provides that no employer covered by the Act "shall discriminate between employees on the basis of sex."

The Executive branch and other governmental agencies have taken the same position. The Office of Federal Contract Compliance of the U. S. Department of Labor has issued interpretative guidelines for enforcing Executive Order 11246 (3 C.F.R. 339) which prohibits sex discrimination by employers holding federal contracts. The Sex Discrimination Guidelines provide, in part, that "Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing." 41 C.F.R. 60-20.3(g). Further interpretations of the guidelines state that the time when maternity leave shall begin is primarily a medical decision to be made by the pregnant employee and her physician. Wilks, *Memorandum*, Department of Labor, 1970.

Federal Courts of Appeals, considering this issue have overwhelmingly supported Respondents' view that mandatory maternity leaves are violative of the equal protection

clause. *LaFleur v. Cleveland Board of Education,* 465 F.2d 1184 (6th Cir. 1972); *Green v. Waterford Board of Education,* 473 F.2d 629 (2nd Cir. 1973); *Buckley v. Coyle Public School System,* 476 F.2d 92 (10th Cir. 1973); *Contra, Cohen v. Chesterfield County School District,* 474 F.2d 395 (4th Cir. 1973).

Federal District Courts faced with this issue have also concurred: *Bravo v. Board of Education of the City of Chicago,* 345 F. Supp. 155 (N.D. Ill. 1972); *Heath v. Westerville Board of Education,* 345 F. Supp. 501 (S.D. Ohio 1972); *Williams v. San Francisco Unified School District,* 340 F. Supp. 438 (N.D. Cal. 1972); *Pocklington v. Duval County School Board,* 345 F. Supp. 163 (M.D. Fla. 1972).

The same result has been reached by a number of rulings based on state law. For example, the Commissioner, New York State Division of Human Rights, has ruled that a regulation requiring teachers to take a leave of absence after the fourth month of pregnancy and to remain on leave until at least six months after the birth of the child was discrimination based on sex. *State Division of Human Rights v. Board of Education of Union Free School District No. 22,* Case Nos. CS-21025-70, *et seq.* (June 29, 1971). *Accord: Awadallah v. New Milford Board of Education,* N.J. Dept. Law and Public Safety, Sept. 29, 1971; *Blair v. New Milford Board of Education,* No. E02ES-5337 (Sup. Ct. Hackensack, N.J., Jan. 20, 1971); *Truax v. Edmonds School District #15,* Superior Ct. Snohomish County, Washington, August 1971, Dkt. #107915. *Contra, Cerra v. East Stroudsburg Area School District,* 299 A.2d 277 (1973).

Similarly, the Wisconsin Department of Industry, Labor and Human Relations has made an interpretive ruling of that state's law dealing with sex discrimination.

They held that the time when a woman leaves before childbearing is a matter between the employee and her doctor. They assured to women who require time away from work for maternity purposes the same working conditions or privileges as employees who require a temporary work interruption for any other medically related reason. *Cooley v. Board of Education, Waterford Union High School*, Department Human Relations, Waterford, Wisc. February 1, 1971. *Accord: Kupczyk v. Westinghouse Electric Corporation*, Case No. CSF-152-6-67, March 3, 1969.

Labor arbitration decisions have also concurred in the holding that mandatory maternity leave policies amount to sex discrimination "without the constitutionally required rational basis." An arbitrator in Michigan held that a rule which required teachers to leave in their fifth month of pregnancy was arbitrary and discriminatory and resulted in substantial financial hardship. As a result the teacher was awarded lost salary, costs for lost insurance benefits and automatic restoration to her former position. *Southgate Educational Association and Board of Education of Southgate Community School District*, AAA Case No. 5439-0323071 (August 3, 1971). *Accord: Middletown Board of Education*, 56 L.A. 830, 832 (1971); *Flo v. General Electric Company*, 195 N.Y2d 652 (1959); *Tecumseh Products Co. v. Wisconsin Employment Relations Board*, 126 N.W.2d 520 (1959).

Amicus respectfully urges this Court to give great weight to these persuasive authorities and to declare Petitioners' mandatory maternity leave regulation unconstitutional.

CONCLUSION

It is respectfully submitted that for the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit, rendered July 27, 1972, should be affirmed.

Respectfully submitted,

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